No. 22480

In the

United States Court of Appeal

For the Ninth Circuit

DAVID ERLICH,

Appellant,

vs.

JUDA GLASNER, BEZLIAL ORLANSKI, NEPTALI FRIEDMAN, OSHER ZILBERSTEIN; JUDA GLASNER and OSHER ZILBERSTEIN doing business as the UNITED ORTHODOX RABBINATE of GREATER LOS ANGELES, UNITED ORTHODOX RABBINATE of GREATER LOS ANGELES, A. M. BAUMAN and JACOB ADLER,

Appellees.

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WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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PRELIMINARY STATEMENT

This is an appeal by the plaintiff [Tr. p. 119] from a judgment of dismissal [Tr. pp. 106-112] holding that plaintiff's amended complaint did not state a claim upon which relief could be granted [Tr. p. 109] and that defendants were entitled to summary judgment because there was no triable issue of fact [Tr. p. 112].

The question of the sufficiency of plaintiff's complaint was heard by this Court in appeal No. 19872 (*Erlich v. Glasner*) and reversed on the grounds that the trial court failed to state the reasons for its dismissal (*Erlich v. Glasner,* 9th Cir. 1965, 352 F. 2d 119).

The question of the sufficiency of plaintiff's amended complaint was before this court in appeal No. 20982 (*Erlich v. Glasner*) and reversed on the grounds that the District Court failed to comply with the provisions of Rule 12 (b) in that affidavits submitted by defendants in support of their motion to dismiss for failure to state a claim required this court to treat this motion as one for summary judgment under Rule 56 (*Erlich v. Glasner,* 9th Cir. 1967, 374 F. 2d 681).

This matter is now before this court for a third time.

STATEMENT AS TO JURISDICTION

This is an action under the Civil Rights Act (42 U.S.C.A. 1983, et seq.). Jurisdiction lies in the Federal Court pursuant to 28 U.S.C.A. 1343 [Tr. p. 2]. The judgment of October 30, 1967 [Tr. pp. 116-118] is a final decision, reviewable in this court (28 U.S.C.A. 1291).

STATEMENT AS TO FACTS

The facts are all contained in the amended complaint [Tr. pp. 2-6] and are the same as recited in the opinion of *Erlich v. Glasner,* 9th Cir., 1965, 352 F. 2d 119, 120-121 and *Erlich v. Glasner,* 9th Cir., 1967, 374 F. 2d 681.

David Erlich is engaged in the process of slaughtering and processing kosher poultry, which he distributes wholesale and retail to the Jewish populace in Los Angeles and neighboring counties. For 13 years he op-

erated as an individual under the fictitious name of West Coast Poultry Company [Complaint, Par. II, Tr. p. 3]. In August of 1960 he formed a corporation known as the West Coast Poultry Company which continued the same business at the same address. Plaintiff and his wife own all of the outstanding shares of stock in this corporation and the appellant is the president and general manager thereof. [Complaint, Par. III, Tr. p. 3].

The defendant Juda Glasner is a civil service employee employed by the Department of Health of the State of California as Kosher Food Law Representative charged with the enforcement of California Penal Code §383b. [Complaint, Par. V, Tr. p. 3]. He and the defendants Chaim I. Etner and Osher Zilberstein are also engaged in business under the fictitious name of United Orthodox Rabbinate of Greater Los Angeles [Complaint, Par. IV, Tr. p. 3]. Defendants Juda Glasner, Chaim Etner and Osher Zilberstein as alleged orthodox Rabbis contend that they, and only they, are empowered and have full and complete authority to dictate what is and what is not kosher. [Complaint, Par. VI, Tr. p. 3]. Thus they have created themselves as the sole heirarchy to supervise kashruth. To enforce their dictatorship and compel the kosher poultry dealers of Southern California to retain their rabbinical services, the defendants use the police enforcement position of defendant Glasner, California Kosher Food Law Representative, and with threats of criminal prosecution

coerce the poultry dealers of Southern California to retain their rabbinical services [Complaint, Par. VII, Tr. p. 4].

To compel the plaintiff in this cause to retain the rabbinical services of the United Orthodox Rabbinate of Greater Los Angeles, the defendant Juda Glasner in his capacity as Kosher Food Law Representative but not within his duties as kosher food law representative, filed two criminal complaints against the plaintiff, falsely accusing him of violating California Penal Code §383b [Complaint, Par. VIII (b); Tr. p. 4].

In the second criminal complaint in which the defendant Glasner was the complaining witness, Sam Salter and John Reyna, former employees of the plaintiff were offered payment to falsely testify under oath that the plaintiff was not slaughtering chickens pursuant to orthodox Hebrew religious requirements [Complaint, Par. VIII (d); Tr. p. 4].

When prosecution of the plaintiff under California Penal Code §383b was unsuccessful, the defendants pursuant to their conspiracy to compel plaintiff to retain the rabbinical services of the defendant, United Orthodox Rabbinate of Greater Los Angeles, again with Glasner as the complaining witness, but not within his duties as kosher food law representative, filed a series of criminal complaints against Sidney Abramovitz, David Glickman, Bezlial Orlanski and Neptali Friedman, employees of the plaintiff, falsely charging

them with violating California Penal Code §383b, so that they left the employ of the plaintiff [Complaint, Par. VIII (d) to (h); Tr. pp. 4-5].

Still in pursuance of their policy of coercion, the defendants communicated with the customers of the plaintiff and warned them that if they purchased kosher poultry from the plaintiff they would be charged by the defendant Glasner with a violation of California Penal Code §383(b) [Complaint, Par. VIII(a); Tr. p. 4], and to show that they meant business, the defendants in conformance with their conspiracy, entered into a champertous agreement with competitors of the plaintiff, who commenced an action in the Superior Court of the State of California, being L.A. Superior Court action No. 825,740 for an injunction to restrain plaintiff from selling poultry unless it was done under the supervision of these defendants [Complaint, Par. VIII (i); Tr. p. 5]. Furthermore, by means of advertising, these defendants cautioned the public of Southern California not to purchase any of plaintiff's kosher products [Complaint, Par. VIII (b), Tr. p. 4].

An amended complaint was filed in which it was alleged in paragraphs VII and VIII that the conduct of the defendant Glasner was: "not within the course of his duties as Kosher Food Law representative." [Tr. p. 4]. Plaintiff further amended his complaint by adding to paragraph IX, allegations that the interference by the defendants with the business of the West Coast Poultry Company was a direct interference with plain-

tiff's right to peacefully operate his business and earn a livelihood for himself and his family; all in violation of the privileges and immunities guaranteed to him as a citizen of the United States by Section 1 of Amendment XIV of the Constitution of the United States.

Plaintiff in his amended complaint also added paragraph X requesting punitive damages [Tr. p. 6].

Following the spreading of the second mandate, the appellees Judah Glasner and Chaim I. Etner filed answers to the amended complaint [Tr. pp. 18-22]. The remaining defendants, through their attorney Phil Silver, served plaintiff's counsel with a copy of an answer but never filed it.

On July 14, 1967 defendant Judah Glasner filed his motion to dismiss the amended complaint and the action on the grounds that the amended complaint failed to state a claim against this defendant [Tr. pp. 23-24].

On August 11, 1967 defendant Judah Glasner filed an amended notice of motion seeking judgment on the pleadings, summary judgment in the alternative or both [Tr. p. 32].

On August 25, 1967 the remaining defendants with the exception of Chaim I. Etner, filed their notice of motion to dismiss the complaint [sic] and for entry of summary judgment [Tr. p. 50].

As to Chaim I. Etner, a settlement was concluded between him and the plaintiff and he is no longer a party to the action.

On October 10, 1967 the court granted the motions to dismiss and for summary judgment and directed that its opinion constitute the findings [Tr. pp. 106-112] (*Erlich v. Glasner,* 274 Fed. Supp. 11). On October 30, 1967 judgment of dismissal was entered in favor of the defendants [Tr. pp. 116-117] and this appeal thereupon followed [Tr. p. 119].

CONTENTIONS AND ISSUES

The primary issue, of course, is the right of plaintiff David Erlich to maintain his present law suit for violation of his civil rights. No adjudication on the merits has been had and the trial court has denied him an opportunity to go to trial on the grounds that:

1. The West Coast Poultry Company, a California corporation is the victim, and not the plaintiff, and a corporation cannot maintain an action under the Civil Rights Act.

2. What defendant Judah Glasner did as Kosher Food Law Inspector of the State of California was discretionary acts within the scope of his duties and therefor he was immune from prosecution under the Civil Rights Act.

Plaintiff David Erlich contends:

1. That the activities of the defendants injured the plaintiff, not the corporation.

2. That except for judges, legislators and prosecutors, state officials are *not* immune from being sued for violation of the Civil Rights Act.

3. That regardless, the overt acts of the defendants alleged in Paragraph VIII of the complaint [Tr. pp. 4-5] were not discretionary acts within the course of the duties of the Kosher Food Law Inspector.

The issues presented on this appeal are:

1. Did David Erlich in his amended complaint set forth sufficient injuries to himself so that he is a proper plaintiff in this law suit for violation of his civil rights.

2. Is the Kosher Food Law Inspector of the State of California immune from suit under the Civil Rights Act for discretionary acts done in the course of his duties.

3. Are the overt acts charged in the amended complaint discretionary activities performed by defendant Glasner in the course of his duties.

SPECIFICATION OF ERRORS

The trial court erred in the following respects:

1. Holding that any injury which occurred because of violation of the Civil Rights Act was done to West Coast Poultry Company, a California corporation, and not to plaintiff as an individual [Tr. pp. 108-109].

2. Holding that immunity to a State Officer for discretionary acts was an absolute defense in the federal court for violation of the Civil Rights Act [Tr. pp. 109-111].

3. Holding that the activities of the defendant Glasner fell within the letter of his discretionary duties thus clothing him with immunity under the circumstances of this case [Tr. p. 111].

4. Holding that plaintiff expects this court and a jury to determine what is Kosher and what is treife [Tr. pp. 111-112].

5. Holding that there is no triable issue of fact in this cause [Tr. pp. 109-112].

ARGUMENT

POINT I

REGARDING THE QUESTION OF IMMUNITY

In holding that defendant Judah Glasner as a state officer was not subject to an action for violation of the Civil Rights Act for his discretionary acts within the scope of his authority this trial court relied on *Hoffman v. Halden,* 9th Cir., 1959, 268 Fed. 2d 280 [Tr. p. 110; *Erlich v. Glasner,* 274 Fed. Supp. 11, pp. 13-14].

Unquestionably, that was the decision of this Court in *Hoffman v. Halden* when it was decided in 1959. However, subsequently the Supreme Court in 1961 decided *Monroe v. Pape* (*Monroe v. Pape,* 1961, 365 U.S. 167; 81 S. Ct. 473; 5 L. Ed. 2d 492) which held that

public officials (judges, prosecutors and legislators excepted) have no immunity under state law in an action brought under the Civil Rights Act.

When the same question presented itself again to this Court in 1962 (*Cohen v. Norris,* 9th Cir., 1962, 300 Fed. 2d 24) this Court on the basis of *Monroe v. Pape* rejected the same defense of state immunity and overruled its former holding in *Hoffman v. Halden.* In discussing immunity this Court in *Cohen v. Norris* stated on p. 33:

> "*Monroe v. Pape* involved police officers and, while the opinion of the court does not specifically discuss immunity, the result reached necessarily implies rejection of such a defense as a general proposition. As appellees concede, they would not be immune from liability had an action been brought against them in the courts of California for false arrest and imprisonment. See *Miller v. Glass,* 44 Cal. 2d 359, 282 P. 2d 501. But in any event, no local rule of immunity unassociated with a generally recognized common-law immunity can stand as a defense in a Civil Rights Acts case."

In *Nelson v. Knox* (6th Cir. 1958), 256 F. 2d 312, 314 it was stated:

> "We hold at the outset that the extent of the defendant's insulation from liability under the Civil Rights Act cannot properly be determined by reference to the local rule in Michigan. Surely each state cannot be left to decide for itself which of its

officials are completely immune from liability for depriving a citizen of rights granted by the federal constitution. The question must be decided as a matter of general law."

In at least one instance the defense of immunity from prosecution heretofore available to Judges, Prosecutors and Legislators (*Agnew v. Moody* (9th Cir., 1964), 330 F. 2d 868), was held not applicable as a defense when the offender acts in some capacity other than in the position which grants him the immunity. Such a situation presented itself in *Robichaud v. Ronan* (9th Cir. 1965), 351 F. 2d 533, where the plaintiff brought an action under the Civil Rights Act against the county attorney and the deputy county attorney from Maricopa County, Arizona. The defendants pleaded that they were immune from liability for acts committed in the performance of their official duties, and the trial court dismissed the complaint. In reversing, the appellate court stated on page 536:

"We believe, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity —integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and Laws? (citations.) To us, it seems neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

and the Court further stated on pages 537-538:

> "The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process."

In further support of its ruling that immunity precluded the present action, the trial court referred to *Pierson v. Ray,* 1967, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 and applied it to the present cause as follows [Tr. p. 111; *Erlich v. Glasner,* 274 F. Supp. 11, 14]:

> "In that case police officers were acting under an unconstitutional law and the court held that, if they were acting in good faith, no liability ensued. Here, we are dealing with a state representative acting within his discretionary duties and whether or not in so acting he is clothed with immunity from liability under the Civil Rights Act. To hold that the Kosher Food Law Representative or anyone in a similar position is required to establish his good faith in a court after his activity was within his discretionary duties would lead to endless harassment and ultimate frustration in carrying out his duties. It is, therefore, concluded that defendant Glasner's activity falls within the letter of his discretionary duties and that he is clothed with immunity under the circumstances of this case."

It is respectfully submitted that the trial court's conception of *Pierson v. Ray* is not correct for *Pierson v. Ray* only held that good faith and probable cause which is available as a defense to a public official in a state court action is also available as a defense in an action under Sec. 1983 of the Civil Rights Act. As Mr. Chief Justice Warren stated (386 U.S. 557; 87 S. Ct. p. 1219):

> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under Sec. 1983. This holding does not, however, mean that the complaint should be dismissed."

This holding is merely that good faith and probable cause is a defense; to be pleaded and proved by defendants as any other defense. That this seems to be the correct interpretation is indicated by the decision of this Court in *Notaras v. Ramon,* 9th Cir., 1967, 383 Fed. 2d 403, 404 holding that good faith was an issue in that cause having been tendered as a defense in the pre-trial order.

That *Pierson v. Ray* means that good faith and probable cause is an affirmative defense is the conclusion also reached by Judge Hauk in *Herbert v. Morley,* U.S. D. C. Central Div. Calif., 1967, 273 Fed. Supp. 800 where it is stated on p. 805:

> "While affirming the doctrine of *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) *supra,* that police officers are subject to suit under Sec. 1983, the Court specifically held that 'the defense of good faith and probable cause * * * available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under Sec. 1983.' 386 U.S. 547, 557, 87 S. Ct. 1213, 1219, 18 L. Ed. 2d 288, 296 (1967)."

In support of its position that immunity shielded defendant Judah Glasner, an employee of the State of California for his discretionary acts within the scope of his authority, the Trial Court in its opinion (which is also the findings) refers to *S. & S. Logging Co. v. Barker,* 9th Cir., 1966, 366 Fed. 2d 617 which while not determining the application of immunity in Civil Rights cases did refer to *Norton v. McShane,* 5th Cir., 1964, 332 Fed. 2d 855 [Tr. p. 110; *Erlich v. Glasner,* 274 Fed. Supp. p. 14].

S. & S. Logging Co. was, of course, not a Civil Rights case. It was an action for violation of the anti-trust laws brought under Sec. 4 and Sections 1 and 2 of the Sherman Act (159 Sc. A. 1, 2) of the Clayton Act (15 U.S.C.A. 15) against employees of the Federal Government.

Norton v. McShane was an action brought by plaintiffs against officials of the United States Department of Justice to recover damages for alleged deprivation

of their rights under the Civil Rights Act. In affirming a judgment for defendants, however, the appellate court was careful to point out that Sec. 1983 is applicable only to deprivation of rights when defendant is acting under color of *state* law, not federal law (*Norton v. McShane,* Supra on p. 862).

If in the present cause defendant Judah Glasner was charged with acting under color of federal law, *Norton v. McShane* could be applicable.

The trial court also relied on *Glickman v. Glasner,* 230 C.A. 2d, 120, 40 Cal. Rptr. 719 [Tr. p. 109, *Erlich v. Glasner,* 274 F. Supp. 11, p. 13] that Glasner's activity was within his discretionary duties and therefor he was immune from tort liability. However, *Monroe v. Pape,* 1961, 365 U.S. 167 (81 S. Ct. 473, 5 L. Ed. 2d 492) and *Cohen v. Norris* (9th Cir., 1962) 300 Fed. 2d, 24, 33 have now definitely established that state immunity from tort liability is not available as a defense in an action brought under the Civil Rights Act.

In *Sava v. Fuller,* 1967, 249 C.A. 2d 281; 57 Cal. Rptr. 312, it is stated on p. 288:

> "The case of *Glickman v. Glasner, supra,* is troublesome. No specific immunity appears to have been involved. The court based its holding upon the fact that the public employee was engaged in the exercise of a discretionary function. On the other hand, section 820.2 [Government Code] was not mentioned. The court did not consider whether the libel '*resulted from*' the exercise of a discre-

> tionary function. Neither did it consider any of the many cases which have construed the Federal Tort Claims Liability Act. (28 U.S.C.A., Sec. 2680, Subd. (a).)"

In passing it should be noted that the office of Kosher Food Law Inspector was not created by the Legislature of the State of California, but by the State Personnel Board at the request of the Department of Public Health to carry out the provisions of Calif. Health and Safety Code, Sec. 214. Under Sec. 214 the Calif. Department of Public Health has the responsibility for enforcement of Section 383b of the Penal Code. (*Glasner v. Department of Public Health,* 1967, 253 A.C.A. 813; 61 Cal. Rptr. 415.) In other words, Glasner was only a police officer with limited duties.

POINT II

REGARDING THE DISCRETIONARY ACTS OF THE DEFENDANT GLASNER.

In concluding that the defendant Glasner was immune from prosecution under the Civil Rights Act, the Trial Court referred to his discretionary activities within the scope of his authority.

As the Trial Court stated:

> "It is, therefore, concluded that defendant Glasner's activity falls within the letter of discretionary duties and that he is clothed with immunity under the circumstances of this case." [Tr. p. 111; *Erlich v. Glasner,* 274 Fed. Supp. on p. 14.]

It is respectfully submitted that this statement by the Trial Court is in error. While the duties of Kosher Food Law Inspector may have allowed him to exercise discretion [Fn., Tr. pp. 110, 111; *Erlich v. Glasner,* 274 Fed. Supp. on p. 13], the actual conduct of the defendant Judah Glasner as Kosher Food Law Inspector as alleged in the amended complaint were definitely not within his discretionary duties in that respect. For example, the mere fact that as Kosher Food Law Inspector, defendant Glasner was authorized to enforce violations of Penal Code, Section 383b (California Health and Safety Code, Section 214) did not authorize him to employ tainted testimony to secure a conviction. (Complaint, Paragraph VII g; [Tr. p. 5].)

If the West Coast Poultry Company, a California corporation, violated Penal Code, Section 383b, presumably under his duties as the Kosher Food Law Inspector the defendant Glasner had the authority to issue a complaint against the corporation charging such violation; but, he did not have the discretion to determine to by-pass the corporate offender and charge Erlich, an individual, as the culprit. (Paragraph VIII c) [Tr. p. 4].

Presumably the defendant Glasner as the Kosher Food Law Inspector may have had discretion to proceed against the West Coast Poultry Company, a corporation, and Erlich, an individual, for violating Penal Code, Section 383b, but it certainly wasn't within the scope of his duties to deliberately hound and harass the employees of the corporation and of plaintiff so

that they would leave the employ of the corporation and the plaintiff (Paragraph VII, d through f [Tr. pp. 4, 5].)

Presumably the defendant Glasner as the Kosher Food Law Inspector had discretion to report violations of the kosher food law committed by plaintiff to his superiors in the California Department of Public Health, or even to prosecuting officials; but it was not a discretionary activity on his part to enter into champertous agreements with competitors of Erlich to commence injunction proceedings to restrain Erlich from selling kosher poultry unless he retained the rabbinical services of the defendants. (Paragraph VIII i, [Tr. p. 5; and affidavit of Samuel Goss, Tr. pp. 88-90].)

Without unduly burdening this Court, it is respectfully submitted that there is sufficient evidence available that what the defendant Glasner did under color of State law, was not activity within the letter of his discretionary duties.

POINT III

REGARDING THE QUESTION OF ORTHODOX JUDAISM.

The Trial Court is under the impression that it would be called upon to decide as a matter of fact:

> "Who is and who is not an orthodox Rabbi, what is and what is not kosher poultry, and whether plaintiffs Schoictim were treife." (Tr. p. 112; *Erlich v. Glasner,* 274 Fed. Supp. on. p. 14.)

Plaintiff differs. Orthodoxy and kosher are not issues in the cause, and their appearance therein was interjected by defendants, not by the plaintiff. The defendant, Judah Glasner, commences his affidavit in support of a motion for summary judgment as follows [Tr. p. 45]:

> "That I am and at all times mentioned in plaintiffs Amended Complaint have been an ordained Orthodox Rabbi in good standing and accredited to funcion in all spheres of Rabbinate, . . ."

Since this is not a true statement, plaintiff immediately furnished the Court with facts to impeach Glasner.

The question is, not Orthodoxy, but what Glasner did in his capacity as Kosher Food Law Inspector; and under those circumstances it is immaterial whether he was an Orthodox Rabbi as required by the State of California, or not. However, if for some reason the defendant feels that it is important that Glasner establish his status as an Orthodox Rabbi, obviously plaintiff should be permitted to produce evidence that in his synagogues he permits mixed seating [Tr. pp. 67-72]; and that mixed seating is heretical (*Katz v. Singerman,* La. 1960, 120 So. 2d 670; *Fisher v. Congregation B'nai Yitzhok,* Pa. 1955, 177 Pa. Super. 359, 110 A. 2d 881; *Davis v. Scher,* Mich. 1959, 356 Mich. 291, 97 N.W. 2d 137 [Tr. p. 94]). That at least would aid the trier of fact, whether Court or Jury, to determine what weight to give to the testimony of defendant Glasner.

The question then is not one of Rabbinical Orthodoxy or kosher poultry, or whether plaintiff's Schoictim were treife, but the activities of defendant Glasner in his capacity as Kosher Food Law Inspector of the State of California. Of course, should the defendant Glasner not raise the question of his rabbinical Orthodoxy upon the trial of the action, obviously it could not be an issue for determination by the trier of fact.

POINT IV

REGARDING THE DEPRIVATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT.

In entering judgment for the defendants the trial court stated:

> "The plaintiff in the original action was the corporation, West Coast Poultry Company, which complaint was dismissed because a corporation is not a person within the meaning of the Civil Rights Act. In the amended complaint of the present action which was then filed, David Erlich, the stockholder, is the plaintiff." (Tr. p. 107; *Erlich v. Glasner,* 274 F. Supp. on p. 12.)

The statement is not correct. West Coast Poultry Co., the corporation was never a party to this action. David Erlich was always the plaintiff in this cause. He filed the original complaint and the amended compliant. (*Erlich v. Glasner,* 1967, 374 Fed. 2d 681, 682.)

West Coast Poultry, the corporation, was the plaintiff in another action (No. 64-931 CC) which was dismissed under the doctrine of *Hague v. C.I.O.* (1939), 307 U.S. 496, [59 S. Ct. 954, 83 L. Ed. 1423] that a corporation may not maintain an action under the Civil Rights Act. Erlich was not a party to that action and of course is not bound by that judgment.

Erlich brings the present action because of injuries done to him personally. That he personally was the victim of defendants' acts is evidenced by the following:

a. Since Erlich is the dominant shareholder in the corporation, an attack upon the corporation is a direct injury to plaintiff's property consisting of his ownership of shares in the corporation.

b. Under the privileges and immunities section of Section 1, Article XIV of the United States Constitution, Erlich is guaranteed this right to pursue a lawful occupation and earn a living for himself and his family without interference by defendants.

c. That several of the overt acts alleged in paragraph VIII of the amended complaint, are directed against the plaintiff personally, and not against the corporation [Tr. p. 4-5].

A.

Regarding the Injury to the Plaintiff as a Shareholder of West Coast Poultry Company, a California Corporation.

While it is true that Section 1983 permits relief only to natural persons because only natural persons and not artificial persons are citizens of the United States entitled to the privileges and immunities under Section 1 of the XIV Amendment (*Hague v. C.I.O.* (1939), 307 U.S. 496, 514, 59 S. Ct. 954, 83 L. Ed. 1423), nevertheless "a corporation is a 'person' within the meaning of the due process and equal protection clauses of the Fourteenth Amendment. . . ." (*Louis K. Liggett Co. v. Baldridge* (1928), 278 U.S. 105, 111 [49 S. Ct. 57, 58, 73 L. Ed. 204]).

A person's business, whether corporate or individual is also a property right (*Louis K. Liggett Co. v. Baldridge, supra.)*

In California shares of stock are personal property (*Kirkland v. Levin* (1923), 63 Cal. App. 589, 590 [219 Pac. 455]), and although the owner of shares is not the owner of the corporate assets, he has a right to share in the corporate earnings and assets after dissolution (*Rhode Island Hospital Trust Co. v. Doughton* (1925), 270 U.S. 69, 81 [46 S. Ct. 256, 258] 70 L. Ed. 475). Since the value of shares is determined by the corporation's assets and earnings, any impairment of the corporation's property or its earning power re-

duces the value of the stock and proportionally diminishes the value of the shareholders property (*Burke v. Badlam* (1881), 57 Cal. 594, 601).

Plaintiff and his wife own all of the outstanding shares of stock in West Coast Poultry Company [Amended Complaint, par. III, Tr. p. 3]. The conduct of the defendants as alleged in the amended complaint was in violation of the privileges and immunities of the plaintiff to own property as guaranteed to him by Section 1, Article XIV, of the United States Constitution.

Moreover, a cause of action may exist in favor of both the corporation and the stockholder.

In *Sutter v. General Petroleum Corp.* (1946), 28 Cal. 2d 525, 170 P. 2d 898, plaintiff commenced an action for fraud. The plaintiff contended that by fraudulent representations and promises he was induced to participate in the organization and financing of a corporation. The trial court dismissed the cause of action on the grounds that the injuries complained of were done to the corporation and not the plaintiff as a shareholder and that since the cause of action was not derivative or representative in which the shareholders would sue in behalf of the corporation, no cause of action was stated.

In reversing the Supreme Court of the State of California said as follows on page 530:

"Generally a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other shareholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or derivative action on behalf of the corporation. (citations.) But 'If the injury is one to the plaintiff as a stockholder and to him individually and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action. . . . The action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.' (citations.) And a stockholder may sue as an individual where he is directly and individually injured although the corporation may also have a cause of action for the same wrong. (Citations.)"

And again on page 531:

"In that fashion the defect in the island and the failure to perform the promises injured the Development Company and Rincon Company but there was also a direct individual injury to plaintiff Sut-

ter, and, as we have seen, the dual nature of the injury does not necessarily preclude an action by the stockholders as an individual. Defendants, by their promises and representations induced plaintiff to form the corporation and invest his money therein, and then breached their duty of honest dealing with him. By way of damages plaintiff Sutter asserts that because of the false representations he invested $33,440 in the venture and the Rincon Company, and that as the result of the fraud of defendants the stock in the Rincon Company became valueless.

"While ordinarily a stockholder may not sue individually for impairment of a corporation's assets rendering the stock worthless, yet here that result is merely one method of ascertaining the amount of damages suffered by Sutter. He lost his investment which was represented by the stock, and its reduction in value would be the extent of his loss. The damages all flowed from the tort of the defendants."

B.

The Interference by the Defendants With the Plaintiff's Right to Earn a Living for Himself and His Family Is a Violation of Plaintiff's Rights Under the Fourteenth Amendment.

The right to earn a living is a property right guaranteed to the plaintiff under the due process clause of the Fifth Amendment to the Federal Constitution *(De Mille v. American Federation of Radio Artists* (1947), 31 Cal. 2d 139, 153 [187 P. 2d 769]; *Van Zandt v. McKee* (5th Cir., 1953), 202 Fed. Rep. 2d 490, 491) and also under the due process clause of the Fourteenth Amendment to the Federal Constitution (*Truax v. Corrigan* (1921), 257 U.S. 312, 327 [42 S. Ct. 124, 127; 66 L. Ed. 54]; *Wallace v. Ford* [D. C. Texas, 1937], 21 F. Supp. 624, 628).

Truax v. Corrigan, supra, involved the question of a right to picket. The court stated on page 327:

> "Plaintiff's business is a property right (citation), and free access for employees, owner, and customers to his place of business is incident to such right. Intentional injury caused to either or both by a conspiracy is a tort. Concert of action is a conspiracy, if its object is unlawful or if the means used are unlawful."

It is undisputed that the defendants and each of them are interfering with the plaintiff's right to earn a living by attempting to compel him to join and operate his business only pursuant to their rabbinical organi-

zation. It is also undisputed that the defendant Glasner, the Kosher Food Law Representative, is using his official position as an employee of the State of California, under color of law, to coerce plaintiff to join. Unquestionably the defendants were operating under color of law. There is no difference between the facts stated in *Monroe v. Pape* (1961), 365 U.S. 167 [81 S. Ct. 473, 5 L. Ed. 2d 492] where police officers of the City of Chicago broke into the petitioners' home in the early morning, got them out of bed, made them stand naked in the living room, opening drawers, ripping mattress covers, and then taking them to the police station and detaining them on open charges for about 10 hours with the facts in the present cause that the defendant Glasner pursuant to the conspiracy filed unmeritorious complaints, charging the plaintiff with the violation of California Penal Code §383b; and in the second complaint attempted to compensate two former employees of the plaintiff to testify falsely as to alleged transgression. If there is a difference, it can only be one of degree.

In selling his product to the public as kosher, Erlich is only required to exercise his judgment in good faith that the product is in fact kosher (*Hygrade Provision Co. v. Sherman* (1925), 266 U.S. 497 [45 S. Ct. 141] 69 L. Ed. 402; *Erlich v. Municipal Court* (1961), 55 Cal. 2d 553, 11 Cal. Rptr. 758, 360 P. 2d 334).

The defendants should not be permitted to compel plaintiff to do more. Their persistence in so doing is a

direct violation of the Hobbs Act (18 U.S.C.A. 1951) the essential elements of which are interference with commerce and extortion (*Stirone v. United States* (1960), 361 U.S. 212, 218 [80 S. Ct. 270, 274; 4 L. Ed. 2d 252]). It is also in violation of plaintiff's guaranteed civil rights (18 U.S.C.A. 241).

In *Carbo v. United States* (9th Cir., 1963), 314 F. 2d 718, 732, it is stated:

> "Under the Hobbs Act (as distinguished from the Sherman Act) it is not necessary that the subject of the extortion constitute commerce. All that is required is that trade or commerce be affected by extortion 'in any way or degree.' "

In *Robinson v. Lull* (U.S.D.C. Ill. 1956), 145 Fed. Supp. 134, 138, the Court quoted from *Doremus v. Hennessy* (1898), 176 Ill. 608, 614, 52 N.E. 924, 925, 54 N.E. 524, 43 L.R.A. 797 as follows:

> " 'No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require.' "

It is also basic that plaintiff's right to work is included in the concept of liberty within the meaning of the 14th amendment of the Federal Constitution; and when that right is violated the courts will not hesitate to intervene and undo the mischief (*Parker v. Lester* [9th Cir. 1955], 227 F. 2d 708, 713-714).

Dent v. State of West Virginia (1889), 129 U.S. 114 [9 S. Ct. 231], 32 L. Ed. 623, involved the validity of a state statute requiring that a practitioner of medicine obtain a certificate from the State Board of Health that he is a graduate of a reputable medical college in the School of Medicine to which he belongs; or that he has practiced medicine in the state continuously for the period of 10 years prior to March 8, 1881. In discussing the rights of individuals to pursue their vocation, it was stated by Mr. Justice Field on page 121:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republic institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the 'estate' acquired in them—that is, the right to continue their prosecution,—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than the real or personal property can be thus taken."

Traux v. Raich (1915), 239 U.S. 33 [36 S. Ct. 7, 60 L. Ed. 131], involved the question whether the State of Arizona could limit the employment of aliens. Mr.

Justice Hughes in delivering the opinion of the Court stated in regard to the question of the right to work on page 38:

> "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law."

and again on page 41:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was a purpose of the Amendment [Fourteenth Amendment] to secure. (Citations.) If this could be refused solely on the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

In *Meyer v. State of Nebraska* (1923), 262 U.S. 390, [43 S. Ct. 625, 67 L. Ed. 1042], the appellant was convicted under an information which charged him with unlawfully teaching the subject of reading in the German language to a child under 10 years of age who had not attained and successfully passed the 8th grade. In reversing and discussing the rights and freedom under the Fourteenth Amendment:

> "No state . . . shall deprive any person of life, liberty or property without due process of law".

Mr. Justice McReynolds in the opinion for the court stated on page 399:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire a useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized at common law as essential to the orderly pursuit of happiness by free men (citations)."

Terrace v. Thompson (1923), 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255, although affirming the alien property laws then in existence, also stated that the Fourteenth Amendment protected an alien of Japanese descent in his right to earn a livelihood by following the ordinary occupations of life, relying upon *Truax v. Raich* and *Meyer v. State of Nebraska.*

And in *Greene v. McElroy,* 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377, it was again iterated that the right to hold specific private employment and follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concept of the Fifth Amendment.

The allegations of unlawful conduct on the part of the defendants is a direct interference with plaintiff's right to earn a livelihood for himself and his family as guaranteed to him by the privileges and immunities portion of the Fourteenth Amendment. The fact that this is done to a corporation owned and controlled by him and through which he earns his livelihood, rather than to him directly, is of no matter. Language to that effect appears in *Royal News Company v. Schultz* (U.S.D.C., Michigan, 1964), 230 F. Supp. 641, 643 where plaintiff sought an injunction under the Civil Rights Act. (Injunction modified, *Royal News v. Schultz,* (6th Cir., 1965), 350 F. 2d 302).

> "Since the effect of such seizures and criminal prosecutions would be to deprive the plaintiff of business and its employees and agents of livelihood in contravention of their constitutionally protected rights, the court indicated during that hearing that it was inclined to issue an injunction to prevent the abuse of these rights."

C.

Regarding the Allegations in the Amended Complaint.

Moreover, it should not be overlooked that the amended complaint contains many allegations of overt acts of injuries done directly to the plaintiff, rather than through his corporation. For example, paragraph VIII of the amended complaint alleges that the defendants communicated with the customers of the plaintiff [Amended Complaint, Par. VIII(a), Tr. p. 4], and

Paragraph VIII(c) [Tr. p. 4] alleges that the criminal complaints were filed against the plaintiff and not against the corporation (*Erlich v. Municipal Court* (1961), 55 Cal. 2d 553, 11 Cal. Rptr. 758, 360 P. 2d 334). If the corporation was the culprit, why prosecute Erlich. In California corporations are responsible for their own crimes. (Calif. Penal Code, Sec. 7.)

POINT V

REGARDING THE SUMMARY JUDGMENT.

In considering the question whether summary judgment for the defendants was properly granted in this cause, defendants would respectfully call this court's attention to the language of District Judge Lynne in *Azalea Meats, Inc. v. Muscat,* 5th Cir., 1967, 386 Fed. 2d 5, where he states on pp. 9-10:

> "The cases are legion which warn against the use of the summary judgment procedure provided by Rule 56 of the Federal Rules of Civil Procedure to unravel a tangled skein of facts. In *National Screen Service Corp. v. Poster Exchange, Inc.,* 305 F. 2d 647, 651 (5th Cir. 1962) we stated:
>
> > 'Summary judgment should be granted only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is * * *. It is no part of the duty of the Court to decide factual issues, but only to determine whether there are factual issues to be tried * * *.

> * * * 'summary judgment should not be granted if there is the "slightest doubt" as to the facts; * * * The fact that it may be surmised that the party against whom the motion is made is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him.'"

and further on p. 10:

> "In the landmark case of *Alabama Great Southern RR. Co. v. Louisville and Nashville RR.,* 224 F. 2d 1, 50 A.L.R. 2d 1302 (5th Cir. 1955), Judge Hutcheson, as the organ of the court, wrote: ' * * * where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, an examination and cross-examination were necessary instruments in obtaining the truth, we have pointed out that and why the issues may not be disposed of on summary judgment.'"

In *Doff v. Brunswick Corp.,* 9th Cir. 1967, 372 F. 2d 801, 805, it is stated:

> "But on a motion for summary judgment it is the moving party who carries the burden of proof; he must show that no genuine issue of material fact exists and this is true even though at the trial his opponent would have the burden of proving the facts alleged. (citations.)"

Regarding affidavits, this court reiterated the well established requirement in *DePinto v. Provident Security Life Insurance Co.,* 9th Cir. 1967, 374 F. 2d 50, 55 as follows:

"Rule 56(e) requires that evidentiary affidavits filed in connection with motions for summary judgment be made 'on personal knowledge.' Hearsay testimony and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in such an affidavit. (Citations.)"

A.

As to the Defendant Glasner.

Referring now to the affidavit of Judah Glasner in support of the motion for summary judgment (Tr. pp. 45-49), it is filled with opinions and generalities. No evidentiary facts are set forth and he doesn't even contend that what he sets forth is within his personal knowledge (Rule 56(e)).

He adopts the affidavit of his co-defendant Osher Zieberstein and contends that it is true and correct in so far as it relates to his conduct and assumes and believes it to be true in so far as it relates to his conduct and his office (Tr. p. 46).

He exculpates his participation in the injunction proceedings commenced by Pines Poultry and others against plaintiff West Coast Poultry without stating any facts and (Tr. p. 48) which is directly opposite to the affidavit of Samuel Goss which sets forth in detail his active participation in instituting this law suit (Tr. pp. 88-90).

Defendant, Glasner, places the responsibility of criminal prosecution on the City Attorney or District Attorney (Tr. p. 48) without any attempt to explain why plaintiff presumably was singled out as the defendant rather than West Coast Poultry, the corporation, despite the fact that he was convinced from his investigation that West Coast Poultry was in violation of the Kosher Food Law (Tr. p. 49). Nor does his attempt to state the facts that he investigated that led him to that conclusion.

Regardless, plaintiff Erlich submitted an affidavit setting forth facts accompanied by exhibits which flatly contradict Defendant Glasner's general statements (Tr. pp. 62-92).

It is respectfully submitted that nowhere in his affidavit has the defendant Glasner established as a matter of law that he did not actively participate in the overt acts set forth in Paragraph VIII of the amended complaint [Tr. pp. 4-5]. His blanket denials and protestations of innocence are insufficient, particularly in view of the affidavit of Erlich and the exhibits annexed thereto [Tr. pp. 52-92]. Perhaps a jury will accept his explanations—perhaps not. But in any event, there are sufficient disputed facts present that require a decision by a trier of fact.

B.

As to Defendants Orlanski, Friedman & Zilberstein, Etc.

It would seem that if these defendants were sufficiently interested in their motions for summary judgment, they would submit some type of a factual affidavit in support thereof. These defendants have submitted no supporting papers in support of their motion nor have they submitted proposed findings of fact and conclusions of law stating the material facts in which they contend there is no genuine issue (Local Rule 3 (g) 1.).

Instead, they rely upon an affidavit of Osher Zilberstein filed 18 months before. They don't even bother to annex the affidavit to their motion but merely rely on it since it is in the file.

There is nothing to indicate in the courts opinion, which is the findings, that the court relied upon this affidavit in granting the motion for summary judgment. As a matter of fact the findings seem to be quite clear that the court predicated its decision on only two factors, and nothing else:

a. That the injured person was the West Coast Poultry Co., a corporation, and not the plaintiff.

b. That the acts complained of by the plaintiff were discretionary acts and that therefore defendant Glasner as a State employee had immunity from prosecution under the Civil Rights Act.

Nothing in the opinion makes any finding as to any other defendant. However, since the court did grant their motion for summary judgment, their position should be discussed.

The defendants Orlanski, Friedman and Zilberstein argue that since they are Rabbis in an ecclesiastical body, they are therefore acting in a judicial capacity and thus exempt from actions taken against them in their official capacity. Incredible as this argument may seem, nevertheless that is precisely what these defendants urge to the Court [Tr. pp. 8-9].

Without making a "federal case" as to the rights of these defendants to hold court, pass judgment, and issue decrees, suffice it to state that what constitutes the judiciary in the State of California is fully set forth in Article VI, Sec. 1 of the Constitution of the State of California, which does not include ecclesiastical bodies.

Barr v. Matteo, 360 U.S. 564, 569 [79 S. Ct. 1335, 3 L. Ed. 2d 1434];

Agnew v. Moody, 330 F. 2d 868, 869 (9th Cir., 1964);

Oppenheimer v. Stillwell. 132 F. Supp. 761 (U.S.D.C., S.D., Cal., 1955).

Yet these defendants seriously contend it is no violation of plaintiff's civil rights for them to convene as a Court, summon Abramovitz an employee of plaintiff to appear before it to explain his conduct and with pow-

ers of amercement penalize him and plaintiff [Tr. pp. 12-13]. The sole authority these defendants give themselves for this amazing power is that "under Hebrew law, all orthodox Jews are bound to accept the proscription or what is known as an issur (ban) of an ecclesiastical body of Rabbis" [Tr. p. 10]. It is respectfully submitted to this Court that not only is this not true, but under no circumstances could any ecclesiastical body ever enforce its dictates upon anybody (First and Fourteenth Amendments of Federal Constitution).

The question of the validity of an issur appeared in the case of *People v. Gordon* (Special Sessions, Kings County, 1939), 172 Misc. 543; 14 N.Y. S. 2d 333, where the trial court found the defendant guilty of falsely representing products to be kosher in violation of New York Penal Code §435a on the grounds that an issur promulgated by the Rabbinical Board of Greater New York

> ". . . became incorporated by reference into the statute and is to be given effect as a valid and binding legislative enactment."

On appeal, the Appellate Division of the Supreme Court, *People v. Gordon* (1940), 258 App. Div. 421; 16 N.Y. S. 2d 833, reversed the judgment on the law, dismissed the information, remitted the fine and exonerated the bail on the ground that the so-called rabbinate was *not* a tribunal clothed with power to act and decree, stating on page 423:

> "Assuming that the decisions of ecclesiastical judiciatories as to their own jurisdiction are binding upon the parties and the courts, (*Connitt v. R.P.D.C. of N. Prospect,* 54 N.Y. 551) the People failed to establish that the rabbinate was a tribunal clothed with power to act and to decree that a fowl not slaughtered according to the regulations specified in the 'issur' and not bearing a token as above described, is not kosher, and, therefore forbidden to be consumed by Jews."

The decision of the Appellate Division in *People v. Gordon* was affirmed without opinion by the Court of Appeals (*People v. Gordon* (1940), 283 N. Y. 705; 28 N.E. 2d 717).

RECAPITULATION

The trial court in granting the motion for summary judgment concluded that there was no triable issue of fact [Tr. p. 112; *Erlich v. Glasner,* 274 F. Supp. on p. 14] on the basis:

1. That the injured party was not the plaintiff but West Coast Poultry, a corporation, and

2. The immunity of Glasner because of being a State Officer [Tr. p. 109; *Erlich v. Glasner,* 274 F. Supp. on p. 13].

The trial court apparently did not rely upon any affidavits and disregarded plaintiff's statements of Genuine Issues of Fact [Tr. pp. 97-98] except as to Glasner's orthodoxy.

It is respectfully submitted that plaintiff in his individual capacity has a good cause of action for damages under the Civil Rights Act; that genuine issues of fact exist; and that defendants have not demonstrated as a matter of law their freedom from liability.

CONCLUSION

For all of the foregoing reasons the judgment should be reversed.

Respectfully submitted,

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Appendix

APPENDIX

California Constitution, Article 6, §1:

Judicial power; courts

"Section 1. The judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, district courts of appeal, superior courts, municipal courts and justice courts."

California Corporations Code, § 18:

Person defined.

" 'Persons' includes a corporation as well as a natural person."

New York Penal Code, §435 a, McKinney's Consolidated Laws of New York, Book 39, part 1, Article 40, Penal Code §435 a.:

"A person who, with intent to defraud, sells or exposes for sale, any meat or meat preparation, article of food or food product, and falsely represents the same to be kosher, whether such meat or meat preparation, article of food or food product be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements, either by direct statement orally or in writing which might be calculated to deceive or lead a reasonable man to believe that a representation that such food is kosher or prepared

in accordance with the orthodox Hebrew religious requirements or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed the word 'kosher' in any language, or sells or exposes for sale in the same place of business both kosher and non kosher meat or preparation, either raw or prepared for human consumption, who fails to indicate on his window sign and all display advertising in block letters at least 4 inches in height 'kosher and non kosher meats sold here' or who exposes for sale in any show window or place of business both kosher and non kosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat' or 'non kosher meat' as the case may be, or who displays on his window, door or in his place of business, or in hand bills, or in other printed matter distributed in or outside of his place of business, words or letters in Hebraic character, other than the word 'kosher' or any sign, emblem, insignia, symbol or word in simulation of same, without displaying in conjunction therewith in English letters of at least the same size as such characters, sign, emblems, insignias, symbols or marks the words 'we sell non kosher meat and food only' or 'we sell both kosher and non kosher meat and food' as the case may be is guilty of a misdemeanor.

Possession of non kosher meat and food, in any place of business advertising the sale of kosher

meats and food only, is presumptive evidence that the person in possession exposes the same for sale, with intent to defraud in violation of the provisions of this section."

California Penal Code, Sec. 7

Words and phrases

"Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural the singular; the word 'person' includes a corporation as well as a natural person; . . ."

California Penal Code §383b. (Note, Penal Code §383 referred to on page 17 should be section 383b.)

"§383. Kosher meats and meat preparations; sale and labeling regulations; false representations; punishment; kosher defined.

Every person who with intent to defraud, sells or exposes for sale any meat or meat preparations, and falsely represents the same to be kosher, whether such meat or meat preparations be raw or prepared for human consumption, or as having been prepared under and from a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product, or the contents of any package or container, to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the

same place both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs in all display advertising in block letters at least four inches in height 'kosher and nonkosher meats sold here'; or who exposes for sale in any show window or place of business as both kosher and nonkosher meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height, reading 'kosher meat' or 'nonkosher meat' as the case may be; or sells or exposes for sale in any restaurant or any other place where food products are sold for consumption on the premises, any article of food or food preparations and falsely represents the same to be kosher, or as having been prepared in accordance with the orthodox Hebrew religious requirements; or sells or exposes for sale in such restaurant, or such other place, both kosher and nonkosher food or food preparations for consumption on the premises, not prepared in accordance with the Jewish ritual, or not sanctioned by the Hebrew orthodox religious requirements, and who fails to display on his window signs in all display advertising, in block letters at least four inches in height 'kosher and nonkosher food served here' is guilty of a misdemeanor and upon conviction thereof be punishable by a fine of not less than fifty dollars, nor more than three hundred dollars, or imprisonment

in the county jail of not less than thirty days, nor more than ninety days, or both such fine and imprisonment.

The word 'kosher' is here defined to mean a strict compliance with every Jewish law and custom pertaining and relating to the killing of the animal or fowl from which the meat is taken or extracted, the dressing, treatment and preparation thereof for human consumption, and the manufacture, production, treatment and preparation of such other food or foods in connection wherewith Jewish laws and customs obtain and to the use of tools, implements, vessels, utensils, dishes and containers that are used in connection with the killing of such animals and fowls and the dressing, preparation, production, manufacture and treatment of such meats and other products, foods and food stuffs. (Added Stats. 1931, c. 1029, p. 2147 §1.)"

United States Code Annotated, Title 15 § 1

Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or con-

tainer of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Title 15, §2.

Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the descretion of the court.

Title 15, § 15.

Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

United States Code Annotated, Title 18, §241:

Conspiracy against rights of citizens

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise and enjoyment of any right or privilege

secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . .

"They shall be fined . . ."

United States Code Annotated, Title 18, § 1951:

Interference with commerce by threats or violence

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, . . .

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

(3) The term 'commerce' means . . . all commerce between any point in a State . . . and any point outside thereof; or commerce between points within the same State through any place outside such State; and all commerce over which the United States has jurisdiction."

United States Code Annotated, Title 28, §1343:

"*Civil rights and elective franchise*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

United States Code Annotated, Title 28, §1343(1):

> To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.

United States Code Annotated, Title 28, §1343(2):

> To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent.

United States Code Annotated, Title 28, §1343(3):

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

United States Code Annotated, Title 28, §1343(4):

> To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights."

United States Code Annotated, Title 42, §1983:

"*Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

United States Code Annotated, Title 42, § 1985 (3):

"*Conspiracy to Interfere with civil rights*

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

United States Constitution, Fifth Amendment:

> "No person shall . . ., nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution, Fourteenth Amendment, § 1.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH W. FAIRFIELD,
ETHELYN F. BLACK,
ALFRED O. OMANSKY.